IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.102/2002

1. Shri Vaman V. Naik, major
in age, resident of Zorint,
Sancoale, Goa.

2. Smt. Vaman V. Naik, major
in age, resident of Zorint,
Sancoale, Goa. .... Applicants.

V/s.

1. Shri Dattaram R. Arolkar,
major in age, business, resident
of House No.MHN-351, Mangor,
Vasco-da-Gama, Goa.

2. Shri Sandeep J. Powar,
major in age, business, resident of
Chicalim, Mormugao, Flat No.5,
Shrikrishna Building,
Vasco-da-Gama, Goa.

3. Shri Anil Ragunath Mullik,
major in age, business, resident of
House No.MHN-445, Mangor,
Vasco-da-Gama, Goa.

4. Shri Umakant alias Umesh
Sarmalkar, major, in age,
business; and his wife

5. Smt. Tara U. Sarmalkar, major in
age, housewife,
Both resient of Francisco Luis
Gomes Road, Sarmalkar Building,
Vasco-da-Gama, Goa.

6. Jt. Mamlatdar II, Mormugao,
Vasco-da-Gama, Goa.

7. The Chief Secretary, State of
Goa, Secretariat, Panaji, Goa. .... Respondents.

Mr. M.S. Sonak, Advocate for the applicants.

Mr. J.E.Coelho Pereira, Sr. Advocate with Mr.J.Godinho,
Advocate for respondents No.1 to 3.

Mr. H.D. Naik, Addl. Govt. Advocate for respondent No.6.

CORAM : P.V. HARDAS, J.

DATE : SEPTEMBER 12, 2002.

ORAL JUDGMENT :

By consent of parties, this revision is heard finally at the stage of admission.

2. This Civil Revision Application takes an exception to the order passed by the learned Addl. Civil Judge, Senior Division, at Vasco-da-Gama, Goa, on Exhibit-23, an application for dismissal of the suit filed by the defendants No.1 and 2 in Regular Civil Suit No.19/97/B.

3. Exhibit 23, an application by defendants Nos.1 and 2 praying for dismissal of the suit on the ground that the learned trial Court had no jurisdiction to entertain the suit, was filed on 26.8.1999. The learned trial Court, by its order dated 14.10.99, framed 9 issues. Issue No.9, reads as under:

> " 9. Whether the defendant Nos.1 and 2 prove that this Court had no jurisdiction to entertain the suit and grant the relief as prayed in view of bar under Section 58 Sub-Clause 2 of GDD Agricultural Tenancy Act, 1964 ?"

This issue No.9 was directed to be decided as a preliminary issue.

4. It appears that after framing of the issues, the application at Exhibit-23 dated 26.8.1999 was taken up for consideration by the learned trial Court. This application proceeded on the basis of averments made by the defendants in their written statement. It raised certain preliminary objections as regards maintainability of the suit. The learned trial Court heard the learned Counsel for the parties in respect of Exhibit-23. However, it seems that the learned trial Court felt that an additional issue as Issue No.9(a) was also required to be framed in view of the pleadings of the parties and accordingly, framed Issue No.9(a). Learned trial Court then relying on the decision of the Apex Court, referred the issue to the Mamlatdar for decision and meanwhile stayed the suit. It further appears on perusal of the order of the learned trial Court that in the process of framing of issue No.9(a), the trial Court omitted to decide Exhibit-23 on its merits.

5. Mr. Sonak, the learned Counsel for the applicants, original defendants No.1 and 2 has urged before me that the learned trial Court undeniably has powers to recast an issue, delete an issue or frame an additional issue. Mr. Sonak submits that on merits he is not challenging the part of the order by which the learned trial Court has deemed necessity of framing

issue No.9(a). Mr. Sonak further submits that he has a right to apply to the learned trial Court for modification, deletion or framing of additional issues and such a course would be adopted by defendants No.1 and 2 for deletion of issue No.9(a) before the learned trial Court. The order in respect of framing of the additional issue No.9(a) is entirely different and is not connected with the passing of the order on Exhibit-23. In view of this I do not propose to dilate or pronounce upon the correctness or legality of framing of issue No.9(a), as the defendants are free to file an application for deletion of issue No.9(a) before the learned trial Court. On such application being moved by defendants No.1 and 2, the learned trial Court shall decide the application on its own merits, in accordance with law, uninfluenced by any observations made by me in the present order.

6. This leaves a question whether Exhibit-23 can be said to have been decided by the order impugned in this revision, Mr. Coelho Pereira, the learned Senior Advocate appearing for the non-applicants/ original plaintiffs has urged before me that the learned trial Court has deferred passing any orders on Exhibit-23, as the learned trial Court has deferred adjudication on Exhibit-23 on merits in view of the fact that the learned trial Court has deemed it expedient to

refer the issue No.9(a) to the Mamlatdar for his decision. According to the learned Counsel for the non-applicants, this can be inferred on the basis of the observations of the learned trial Court in its operative part of the order. Operative part of the order refers to issue No.9(a) and it further reads that pending the determination of the particular issue, the proceedings in the suit are stayed. On the basis of this, it is tried to be urged before me that the learned trial Court has deferred passing any orders on Exhibit-23.

7. It appears that the learned trial Court while hearing Exhibit-23 did feel the necessity of framing additional issue No.9(a). While in that process, the learned trial Court, it appears to have lost track of Exhibit-23. Though in the opening part of the order the learned trial Judge states that the Order would decide Exhibit 23, the operative part of the Order or the discussion do not refer to Exhibit-23 at all and hence, the submission that the learned trial Court has deferred deciding Exhibit-23 on merits, cannot even be inferred on reading of the order impugned in the present revision. In earlier part of the order, the learned trial Court says that the said order would dispose of Exhibit-23, however, there is no adjudication of plea raised in Exhibit-23 on its merits and, I am afraid that

an inference cannot be drawn that the trial Court has deferred the decision on Exhibit-23 pending decision on issue No.9(a). Learned trial Court could have decided issue No.9 irrespective of the fact whether the trial Court felt that issue No.9(a) is also required to be framed for decision of the suit. The learned trial Court has, therefore, according to me, not decided Exhibit-23, on merits.

8. Exhibit-23 is an application filed by defendants No.1 and 2 for dismissal of the suit on the ground of want of jurisdiction. Had the plea of defendants No.1 and 2 been accepted by the Court, the issue of jurisdiction would have been decided. It would have ultimately decided the suit. The present Civil Revision Application is, therefore, even in terms of the amended Section 115 is maintainable.

9. Since the trial Court has failed to exercise the jurisdiction in deciding Exhibit-23, I am inclined to remit the matter to the trial Court for decision on Exhibit-23. The operative part of the order impugned in the present revision only speaks about necessity of framing issue No.9(a) and referring the issue to the Mamlatdar for decision and staying further proceedings till the decision on issue 9a(a), of the Mamlatdar, Since Mr. Sonak has stated that an

appropriate application would be filed before the learned trial Court for deletion of issue NO.9(a), I do not propose to decide this part of the impugned order, on merits. Learned trial Court, if such an application is moved, shall decide the same on merits uninfluenced by any observations which are made either by the learned trial Court in the order impugned or by me in the present Order. However, since Exhibit-23 has not been decided on merits, the learned trial Court shall decide Exhibit-23 on merits, within a period of one month of the receipt of writ of this Court.

10. Civil Revision Application No..102/2002 is, accordingly, disposed of on the above terms with no order as to costs.

P.V. HARDAS, J.

ssm.